UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CVD EQUIPMENT CORPORATION,

Plaintiff,

-against-

TAIWAN GLASS INDUSTRIAL CORPORATION, and MIZUHO CORPORATE BANK, LTD.,

Defendants.

TAIWAN GLASS INDUSTRIAL CORPORATION,

Counterclaim Plaintiff,

-against-

CAPITAL ONE, N.A.,

Counterclaim Defendant.

10 CIV 0573 (RJH) (RLE)

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF TAIWAN GLASS INDUSTRIAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Defendant-Counterclaimant Taiwan Glass Industrial Corporation ("Taiwan Glass"), pursuant to Local Civil Rule 56.1, submits this Statement of Undisputed Material Facts in support of its motion for summary judgment against Counterclaim-Defendant Capital One, N.A. ("Capital One").

I. The Standby Letter of Credit

1. On or about October 8, 2008, Capital One, as the issuing bank, issued a standby letter of credit for the amount of $3,564,000.00, with Taiwan Glass as the beneficiary, and plaintiff CVD Equipment Corporation ("CVD") as the applicant (the "Standby LC"). See Declaration of T. M. Tsai dated January 27, 2011 (hereinafter, the "Tsai Decl."), ¶ 4, Exhibit 1.

2. The Standby LC was issued in connection with a certain sale of goods transaction between Taiwan Glass and plaintiff CVD Equipment Corporation ("CVD"). Tsai Decl., ¶ 2.

3. In particular, Taiwan Glass agreed to purchase from CVD a certain type of equipment called "Continuous Atmospheric Pressure Chemical Vapor Deposition System" and "Exhaust Gas System", and related know-how and services, for a total purchase price of $11,880,000.00. Id., ¶¶ 2-3.

4. In connection with the sale of goods transaction between Taiwan Glass and CVD, Taiwan Glass agreed to make an advance payment of 30% of the purchase price, i.e., $3,564,000.00, to CVD upon the issuance of the Standby LC. Id., ¶ 3.

5. On or about October 16, 2008, Taiwan paid $3,564,000.00 to CVD. Id., ¶ 6, Exhibit 2.

6. The Standby LC states, among other things, that it was "issued as a performance guarantee covering 30 pct of purchase price of Continuous TCO APCVD System and Exhaust Gas System from CVD Equipment Corporation by Taiwan Glass Ind. Corp. and this amount will be wired to CVD Equipment Corporation by Taiwan Glass Ind. Corp. upon issuance of this letter of credit". Id., ¶ 5, Exhibit 1.

7. Under the Standby LC, Capital One promised that a "draft drawn and negotiated in conformity with the terms of this letter of credit will be duly honored on presentation of documents as specified above . . .". Id., ¶ 7, Exhibit 1.

8. Documents required to be presented for drawing under the Standby LC were: (1) "proof of wire transfer of USD3,564,000 dated --- to CVD Equipment Corporation, 1860 Smithtown Avenue, Ronkonkoma, New York 11779 thru Capital One, N.A., New York"; (2) "copy of request sent to CVD Equipment Corporation instructing them to ship 'Continuous TCO APCVD System and Exhaust Gas System' dated not later [than] November 1, 2009"; and (3) "Beneficiary's signed statement certifying that applicant defaulted in the terms and conditions of a certain agreement dated August 29, 2008 between CVD Equipment Corporation ("Seller") and Taiwan Glass Ind. Corp. ("Buyer")" (together, the "Presentation Documents"). Id., ¶ 8, Exhibit 1.

9. The Standby LC provides that it expired on January 21, 2010 at 3:00 p.m., and that drawings under the Standby LC could only be made after January 1, 2010. Id., ¶ 9, Exhibit 1.

10. The Standby LC further provides that it could be cancelled upon the earliest to occur of several events, including Capital One's receipt of a "copy of an original bill of lading submitted by CVD Equipment Corporation issued to the order of Taiwan Glass Ind. Corp., 261 Sec 3, Nanking E. Rd, Taipei 10566, Taiwan dated not later than November 30, 2009 and indicating CVD Equipment Corporation as shipper". Id., ¶ 10, Exhibit 1.

11. The Standby LC states that it is "subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600" ("UCP 600"). Id., ¶ 11, Exhibit 1.

II. The Purported Cancellation of the Standby LC and Taiwan Glass's Attempted Drawings Thereunder

12. On December 8, 2009, Capital One informed Mizuho Corporate Bank, Ltd. ("Mizuho")[1] that Capital One had cancelled the Standby LC based on a bill of lading submitted by CVD to Capital One (the "Bill of Lading"). Id., ¶ 14, Exhibit 3.

13. Taiwan Glass disputed Capital One's purported cancellation of the Standby LC, and on December 9, 2009, Taiwan Glass (via Mizuho) communicated its objections to Capital One via telex. Id., ¶ 15, Exhibit 4.

14. Among other reasons, Taiwan Glass objected to Capital One's purported cancellation of the Standby LC because the Bill of Lading failed to comply with the requirements of UCP 600. Id., ¶ 16, Exhibit 4. In particular, Taiwan Glass stated that the Bill of Lading was a "received bill of lading" (as opposed to a "shipped bill of lading") and, under Article 20 of UCP 600, such a bill of lading requires an "on board" notation indicating when the goods were loaded on board the vessel. Id.

15. The Bill of Lading does not have an "on board" notation. Id., ¶ 17, Exhibit 5.

16. Furthermore, in its telex communication of December 9, 2009, Taiwan Glass also stated that it had checked with the shipping company[2] and had evidence showing that the goods were not loaded on board a vessel before November 30, 2009. Id., ¶ 18, Exhibit 4.

17. With respect to Taiwan Glass's payments under the contract, a commercial letter of credit was issued by Mizuho (with Taiwan Glass as applicant) in favor of CVD. Id., ¶ 19. Under that letter of credit, the latest date by which the goods must be shipped (i.e., loaded on

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[1] Taiwan Glass was, and remains, a customer of Mizuho. Communications between Taiwan Glass and Capital One concerning the Standby LC were relayed through Mizuho.

[2] The shipping company, or the carrier, was Orient Overseas Container Line ("OOCL").

board a vessel) by CVD was November 30, 2009. Id. CVD does not dispute that the latest shipment date was November 30, 2009. Id.

18. In response to Taiwan Glass's December 9, 2009 telex communication, Capital One argued, in a telex communication dated December 10, 2009, that the Bill of Lading properly complied with Article 20 of UCP 600, stating that the Bill of Lading "indicated that the merchandise was received by the carrier and was signed on behalf of the carrier. The absence of an onboard notation is also covered in Article 20(a)(ii) quote the date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an onboard notation unquote". Id., ¶ 20, Exhibit 6.

19. With regard to Taiwan Glass's assertion that it had evidence that the goods were not loaded on board a vessel before November 30, 2009, Capital One stated: "Our determination was made based on the strength of the bill of lading presented and not on the disposition of the merchandise. Refer to Article 5 [of UCP 600]". Id., ¶ 21, Exhibit 6.

20. Taiwan Glass responded by telex (via Mizuho) on December 14, 2009. Id., ¶ 22, Exhibit 7. With regard to whether the Bill of Lading complied with Article 20 of UCP 600, Taiwan Glass stated: "According to Art. 20(a)(ii) of UCP, where a transport document is pre-printed 'shipped on board', the date of issuance would be deemed to be the date of shipment, there is a need for evidence of the date the goods were shipped on board i.e. pre-printed or by on board notation, but shipper presented only received B/L, which omitted on board notation, so this B/L is not valid under your L/C". Id.

21. With regard to when the goods were actually loaded on board a vessel, Taiwan Glass informed Capital One that the carrier's record indicated that the goods were not loaded on board until December 5, 2009. Id., ¶ 23, Exhibit 8.

22. On January 4, 2010, Taiwan Glass requested payment of $3,564,000.00 under the Standby LC by presenting certain documents, including the Presentation Documents, to Capital One. Id., ¶ 24, Exhibit 9.

23. On January 6, 2010, Capital One refused to honor Taiwan Glass's request for payment under the Standby LC, based on two alleged discrepancies. Id., ¶ 25, Exhibit 10.

24. First, Capital One stated that the "beneficiary's statement is not as per the letter of credit". See, id., ¶ 26, Exhibit 10, p. 2. In particular, Taiwan Glass's "Beneficiary Certificate" (see, Tsai Decl., Exhibit 9, TG 173) states that applicant (CVD) "defaulted in the terms and conditions of the Agreement dated August 29, 2008 between us". Tsai Decl., ¶ 26. According to Capital One, the language used in Taiwan Glass's Beneficiary Certificate was not in conformity with the Standby LC because the Standby LC requires the beneficiary to certify that applicant "defaulted in the terms and conditions of a certain agreement dated August 29, 2008 between CVD Equipment Corporation ("Seller") and Taiwan Glass Ind. Corp ("Buyer")". See, id., Exhibit 10, p. 2.

25. The second reason for Capital One's refusal to honor Taiwan Glass's request for payment was that the Standby LC had, according to Capital One, "expired". Tsai Decl., ¶ 27, Exhibit 10. As the basis for its view that the Standby LC had expired, Capital One referred to its telex communication dated December 8, 2009 (which had informed Taiwan Glass that the Standby LC had been cancelled based on the Bill of Lading, see Tsai Decl., Exhibit 3). Tsai Decl., ¶ 27, Exhibit 10.

26. Taiwan Glass disagreed with Capital One's refusal to honor the Standby LC, stating, among other things, that the purported cancellation of the Standby LC was improper because the Bill of Lading was invalid. Id., ¶ 28, Exhibit 11.

27. On January 11, 2010, Taiwan Glass again requested payment under the Standby LC, submitting various documents (including the Presentation Documents) to Capital One, including a revised Beneficiary Certificate now stating that applicant "defaulted in the terms and conditions of a certain Agreement dated August 29, 2008 between CVD Equipment Corporation ("Seller") and Taiwan Glass Ind. Corp ("Buyer")". Id., ¶ 29, Exhibit 12.

28. On January 13, 2010, Capital One again refused to honor Taiwan Glass's request for payment under the Standby LC, on the basis that "the letter of credit expired and is no longer valid", and explaining that the purported cancellation of the Standby LC was proper because the Bill of Lading complied with the condition for cancellation under the Standby LC. Id., ¶ 30, Exhibit 13.

Dated: New York, New York
January 28, 2011

ALLEGAERT BERGER & VOGEL LLP

By: [signature]

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